Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS AND ANNA E. KLEIN,

Appellants,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

The American Jewish Congress respectfully submits this brief, *amicus curiae*, with the consent of the parties.

Interest of the American Jewish Congress

The American Jewish Congress was organized "* * * to help secure and maintain equality of opportunity * * * safeguard the civil, political, economic and religious rights of Jews everywhere * * * [and] * * * to help preserve, maintain, and extend the democratic way of life." Consistent with these purposes we joined in the submission of a brief amicus curiae to this court in *People ex rel Mc-*

Collum v. *Board of Education*[1] in which we argued the constitutional invalidity of religious teaching in the public schools. We there urged that political liberty and religious freedom could remain inviolate only when there was no intrusion of secular authority in religious affairs or of religious authority in secular affairs. The continued separation of church and state, we stressed, was an indispensable requisite of religious liberty as envisioned by the framers of the First Amendment.

Thereafter we again submitted a brief amicus curiae in a case involving the constitutional guaranty of religious liberty and separation of church and state. In our brief in *Stainback* v. *Po*[2] we argued that a Hawaiian statute restricting foreign language schools constituted an interference with religious teaching inhibited by the First Amendment. We are submitting this brief because once again the guaranty of religious liberty and separation of church and state is challenged by State action.

We regard the principle of religious liberty and separation of church and state as fundamental to American democracy. We deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms which that wall was intended to protect. We believe, further, that our free nonsectarian public school system is one of the most precious products of our American democracy and a unique contribution to modern civilization. We, therefore, feel impelled to express our opposition whenever attempts are made to compromise its integrity.

The evils which James Madison foresaw from impairment of the principle of separation in his Memorial and

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[1] Brief of the Synagogue Council of America and National Community Relations Advisory Council in *People of the State of Illinois ex rel. Vashti McCollum* v. *Board of Education, Champaign, Ill.*, 333 U. S. 203, October, 1947, Term, No. 90.

[2] October 1948 Term, No. 52.

Remonstrance Against Religious Assessment [3] have been proved inevitable when the impairment occurs within the public educational system. The "animosities and jealousies" which accompanied the introduction of the Virginia Assessment Bill [4] are ever present when religious groups seek to employ the public school system to further their sectarian ends. The divisiveness which inevitably results when sectarianism enters the public school affects all American children, but is particularly harmful to children of minority faiths.

For these and other reasons we have consistently opposed the encroachment of religious instruction or worship on the field of public education. We sympathize with and greatly respect the depth of conviction and sincerity motivating those who seek to invoke the aid of the public school system in meeting the problem of religious illiteracy. We doubt greatly that the problem can effectively be met by the device of Bible reading in the public school. But even if it could, the crucial issues involved and our consistent adherence to the principle of separation and liberty would compel us to submit this brief.

Were it not that some, either through misunderstanding or ill-will, equate opposition to religion within the public school system with opposition to religion, we would hardly need state that our position is in no way motivated by hostility to religious instruction.[5] As an organization dedi-

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[3] Annexed as Appendix to *Everson* v. *Board of Education of the Township of Ewing*, 330 U. S. 1, at p. 63 (1947).

[4] *Ibid.*

[5] This Court, itself, pointed out in the *McCollum* case that:

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests

cated to Jewish survival, we naturally place Jewish religious education in the forefront of our activities. In Jewish history and tradition, religious instruction has always been regarded a sacred responsibility of the Jewish community. Today, the overwhelming majority of Jewish children voluntarily attend after-hour and Sunday schools conducted by local Jewish communities where they receive their religious education wholly independent of the public school system.[6] We believe, however, that the responsibility for religious education may not and should not be shared with the public school system, and that the support of government in this field is neither desirable nor necessary. We believe with Jefferson that "It is error alone which needs the support of government. Truth can stand by itself."[7]

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upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. * * *" (333 U. S. 203, 211-212.)

Mr. Justice Frankfurter, in his concurring opinion was similarly careful to point out that:

"The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. * * *" (*Ibid.*, at p. 216.)

These disclaimers, unfortunately, did not forestall abuse of this Court and its decision from sectarian circles. See, e.g., Statement of Catholic Bishops, New York Times, Nov. 21, 1948, p. 63; O'Neill, Religion and Education under the Constitution (1949), *passim*.

[6] Three out of every four Jewish children receive religious instruction at some time or another. Jewish Education Association of New York, *Twenty-five Years of Jewish Education in the U. S.*, American Jewish Year Book (1936-1937) 104; *Hurwich, Religious Education and the Release Time Plan, Jewish Education* (1941) 103-107.

[7] *Notes on Virginia*, in Blau, Cornerstones of Religious Freedom 79 (1949).

Statement of the Case

The appellants, Donald R. Doremus and Anna E. Klein, brought suit in the Superior Court of New Jersey, Passaic County, to enjoin observance of two statutes providing for Bible reading in the public schools of New Jersey (R. 1-3). Appellant Doremus sued as a taxpayer and Appellant Klein as the mother of a child attending the public school conducted by Appellee Board of Education (R. 1). Although no exemption or exception is contained in either statute, it was stipulated that a directive issued by Appellee Board of Education provides that "any student may be excused during reading of the Bible upon request", and that in the present case neither Appellant Klein nor her child requested to be excused. Unsuccessful in the Superior Court (R. 6-7) and in the Supreme Court of New Jersey (R. 22-38), appellants obtained an order by Mr. Justice Burton allowing appeal to the Supreme Court of the United States (R. 38-39). Thereafter, on March 12, 1951, this Court made an order postponing to the hearing on the merits further consideration of the question of jurisdiction and of appellees' motion to dismiss or affirm (R. 43).

Statutory and Constitutional Provisions Involved

The purpose of appellants' suit is to test the constitutionality of two sections of the Revised Statutes of New Jersey (1937). R. S. 18:14-17 provides:

> "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be

done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

These statutes are attacked as violative of the First and Fourteenth Amendments to the United States Constitution, which provide in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *"

This brief is predicated upon the assumption that the statute here involved provides for reading from the Bible as a devotional or religious act. This is implicit in the provision barring comment in the first section and is practically explicit in the second section's bar of *"religious* service or exercise *except* the reading of the Bible or the repeating of the Lord's Prayer." The assumption was accepted by all the parties hereto and by both State courts.[8]

[8] See, e.g., R. 37: "We consider that the Old Testament and the Lord's Prayer * * * [are] a simple recognition of the Supreme Ruler of the Universe and a deference to His majesty * * *"

It is, however, an assumption which must be clearly recognized; for we believe no substantial constitutional issue is raised by a statute providing for the reading or even study of the Bible as a work of literature or for its cultural or historic significance.[9] It is only when the reading of the Bible is an act of religion, or, in the definition of the Virginia Declaration of Rights, an act in the "discharging" of "the duty which we owe to our Creator [10] that constitutional issues are raised.

Question Presented

The question presented by this case, and to which this brief is addressed, is the validity under the First and Fourteenth Amendments to the Federal Constitution of a statute which requires daily reading in the public schools from the Old Testament and permits reading from the New Testament and recitation of the Lord's Prayer, in all cases as devotional acts. Specifically, does this statute constitute a law "respecting an establishment of religion or prohibiting the free exercise thereof".

Summary of Argument

A statute providing for the reading of the Bible or the recitation of the Lord's Prayer as devotional acts in the public school violates the guaranty of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof, which is made applicable to the States by the Fourteenth Amendment. Such a statute is a law which aids one religion and prefers one religion over another; at the very least, it aids all re-

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[9] See concurring opinion of Mr. Justice Jackson in *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 at 235-236.

[10] Quoted in Madison's Memorial and Remonstrance Against Religious Assessments, appended to *Everson* v. *Board of Education*, 330 U. S. 1 at 64.

ligions. It forces profession of belief or disbelief in a religion. It utilizes the public school to aid religious faiths or sects in dissemination of their doctrines and it helps to provide pupils for the inculcation of religion through use of the State's compulsory public school machinery.

The claimed voluntariness of participation is both fictional and irrelevant. The claimed non-sectarianism of the Bible is likewise fictional and irrelevant. Measured by the interpretation of the First Amendment expressed in the *Everson* and *McCollum* decisions, a public school program of devotional Bible reading or Lord's Prayer recitation is clearly invalid. The New Jersey statutes here attacked can stand only if this Court retreats from the position it has taken in the *Everson* and *McCollum* cases and accepts an interpretation of the First Amendment which it has only recently twice rejected. No adequate reason has been offered for the Court's present acceptance of that interpretation.

ARGUMENT

A statute providing for Bible reading or recitation of the Lord's Prayer as devotional acts in the public school violates the guaranty of the First Amendment against laws establishing religion or prohibiting its free exercise.

A. The unitary guaranty of the First Amendment

We submit that the statute attacked in this action is violative not only of the "establishment" aspect of the First Amendment but of the "free exercise" as well. Indeed, we submit that any law respecting an establishment of religion necessarily prohibits its free exercise. Sectarian groups which condemn as "error" the concept of separation developed by American democracy[11] or, at best "the shib-

[11] Syllabus of Errors of Pope Pius IX, Paragraph 55 in Dogmatic Canons and Decrees.

boleth of doctrinaire secularism,"[12] naturally view the establishment bar as of secondary importance, meriting only the narrowest construction and expendible where obvious governmental compulsion easily recognized as a restriction on religious freedom is not proved.[13]

It is this approach which was adopted by the Supreme Court of New Jersey.[14] We urge, however, that this approach is erroneous. In the evolution of the American democratic tradition with respect to religion which culminated in the First and Fourteenth Amendments, there was no dichotomy between separation and freedom. Those whose words and deeds inspired the Constitutional fathers were convinced that religious freedom could be secured only if separation were guaranteed, and that freedom necessarily encompassed separation. To them, the concepts were not merely synonymous, they were identical.[15] As

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[12] Statement of Catholic Bishops, *supra*.

[13] See e.g., Father Murray, "Law or Prepossessions?" 14 Law Contemp. Problems, 23 (1949): "* * * separation of church and state * * * put in its proper grounds in its true relation to the free exercise of religion * * * [is] instrumental to freedom, therefore * * * a relative not an absolute in its own right." Father Parsons, The First Freedom, p. 79 (1948): "As for those who profess no religion, or who repudiate religion, it is difficult to conceive how they can appeal to the First Amendment, since this document was solely concerned with religion itself not its denial. By its very nature as regards what it says about religion, they are outside its ken." See also statement in *Gordon* v. *Board of Education*, 78 Cal. App. 2d 464 (1947) and *Zorach* v. *Clauson*, 22 N. Y. Supp. 2d 339, 344 (1950), that the First Amendment guarantees "freedom of religion, not freedom from religion."

[14] "No one is asserting that his religious practices have been interfered with or that his request to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below * * *" (R. 24).

[15] Roger Williams opposed an "enforced uniformity of religion" [freedom concept] "because it confounds the Civil and Religious" [separation concept]. *The Bloody Tenet of Persecution*, paragraph "Tenthly", quoted in Blau, *Cornerstones of Religious Freedom in*

Justice Jeremiah S. Black stated in his address on Religious Liberty:

> "The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics—that is to say, they meant that one should never be used as an engine for any purpose of the other * * *. For that reason they built up a wall of complete and perfect partition between the two." [16]

The validity of the American democratic tradition of the unity of freedom and separation is manifest in the position of religious freedom in contemporaneous totalitarian states. Wherever the church or the state seeks to use the other as an engine for its own purpose, that is, wherever a state or a church pierces the wall of partition between them, freedom inevitably suffers. Mussolini, a confirmed atheist most of his life and the father of modern totalitarianism, found no difficulty in according state support for religion,[17] for he effectively used the church as an engine for his purposes.[18] The Soviet Government, equally totalitarian and equally atheistic, finds no difficulty in conferring upon its church state support, for it also effectively uses the church as an engine for state purposes.[19] Conversely in Spain, another totalitarian state, the church uses the state as an engine to further its own purposes.[20] In all of

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America (1929), p. 37. Madison fought a bill establishing a provision for teachers of the Christian religion [separation concept] because it violated the "fundamental and undeniable truth 'that religion * * * can be directed only by reason and conviction, not by force or violence" [freedom concept]. Memorial and Remonstrance.

[16] Essays and Speeches (1886) 51.

[17] See *Treaty and Concordat Between the Holy See and Italy*, National Catholic Welfare Conference.

[18] Binchy, *Church and State in Fascist Italy* (1941).

[19] Timasheff, *Religion in Soviet Russia*, 1917-1942.

[20] Bates, *Religious Liberty* (1945) 14-20.

these countries religious freedom has been the inevitable victim.[21]

The unity of the separation and freedom aspects of the First Amendment was recognized in the definitive interpretation of the "establishment" clause announced in the *Everson* case and reiterated in the *McCollum* case:[22]

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'."

We urge that the statute under attack in the present case violates both aspects of the "religion" clause of the First Amendment. It is not merely a law which aids one religion and prefers one religion over another, but also a law which forces persons to profess a belief or disbelief in religion and which punishes them for entertaining or professing re-

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[21] Bates, *supra*, 2-9, 14-23, 40-49.

[22] *Everson*, 330 U. S. 1, at 15-16; *McCollum*, 333 U. S. 203 at 210-11. It is significant that Jefferson's *"separation"* phrase was accepted by this Court as an authoritative interpretation of the First Amendment in a case in which a statute proscribing bigamy was attacked as an infringement of *religious freedom*. *Reynolds* v. *U. S.*, 98 U. S. 145, 164 (1878).

ligious beliefs or disbeliefs. We urge that this case illustrates once again that under our tradition, religious freedom can best be guaranteed if the wall of separation between church and state is maintained secure and impregnable.

B. Forcing profession of religious belief or disbelief

It is important to note that the New Jersey statute makes no provision for consent by public school children or their parents for participation in Bible reading or Lord's Prayer recitation.[23] Indeed, the statute makes no provision for the excusing of children whose religious convictions preclude their participation.[24] On its face, the New Jersey statute, we submit, compels participation in religious exercises and is therefore violative of the First Amendment.

It is true that a "directive" was issued by Appellee Board of Education that "any student may be excused during reading of the Bible upon request" (R. 5). Assuming that the Board had authority to issue such a "directive" notwithstanding the clear and unambiguous language of the statute, there is nothing in the record to indicate that the "directive," whenever it was issued, was communicated to the school children or their parents. Absent such communication, participation was patently compulsory. Neither appellant Klein nor her daughter requested that the latter be excused from participation in Bible reading, even though their opposition to the practice was sufficiently intense

[23] In this respect, this statute is significantly different from released time programs where prior consent of parents is required for children's participation. *McCollum* case, 333 U. S. 203 at 207; Davis, *Weekday Classes in Religious Education*, U. S. Office of Education Bulletin No. 3, 1941, p. 3.

[24] Cf., e.g., Code of Iowa, 1931 Section 4528: "The Bible shall not be excluded from any public school or institution in the state, *nor shall any child be required to read it contrary to the wishes of his parent or guardian.*"

to cause them to brave the displeasure of their community by bringing this suit.[25]

Even if the "directives" were communicated to the children or their parents, the element of compulsion would not thereby be eliminated. This was recognized by the Justices joining in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case:

> "* * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend * * *"[26]

This observation is even more pertinent in the present case, where affirmative action by the child is required if he wishes to disassociate himself from the group, than in the *McCollum* case, where affirmative action was required for association.

Other courts have recognized that the nominal privilege of non-participation in Bible reading does not eliminate the element of "force or influence" or remove the punishment "for entertaining or professing religious beliefs or disbeliefs." Thus, the Supreme Court of Illinois has stated:

> "The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself,

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[25] In the *McCollum* case the petitioner's child did not participate in the religious instruction. Transcript of Record in *McCollum* case, pp. 68, 175, 193.

[26] 333 U. S. 203 at 227.

deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief." [27]

The Supreme Court of Wisconsin made a similar observation:

"When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others." [28]

An Iowa court came to the same necessary conclusion:

"Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a mulititude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the

[27] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910).

[28] *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200 (1890).

invitingly opened door of the church, and receive, with their companions, the instructions there given?" [29]

There was a time when compulsion to participate in Bible reading or prayer recitation was patent and direct. On one occasion, before the Civil War, a hundred Catholic children were expelled from a Boston public school for refusal to participate, and one child was severely flogged for the same reason.[30] In Indiana, in the 1880's, a Catholic girl who refused to learn a chapter from the Bible as required but recited "Maud Muller" instead was kept after school day after day in what turned out to be a vain attempt to force her to violate her religious scruples.[31] Today, compulsion and pressure are more subtle and circumstantial but are no less present.

Children of minority religious groups are particularly faced with a dilemma whenever religion intrudes upon the public school—a dilemma which is always hard and frequently is cruel. They must either subject themselves to being singled out as non-conformists or they must participate in religious practices and teachings at variance with what they learn at home or in their religious schools. It is understandable that not infrequently some of them choose the second alternative as the lesser evil, and that Catholic and Jewish children will participate in Protestant

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[29] *Knowlton* v. *Baumhover*, 182 Iowa 691, 699-700 (1918). See also: *Kaplan* v. *Independent School District of Virginia*, 171 Minn. 142, 155-156 (1927) (dissent):

> "To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage."

[30] Whipple, *The Story of Civil Liberty in the United States*, p. 64 (1927).

[31] Beale, *A History of Freedom of Teaching in American Schools* (1941), p. 211.

religious practices in violation of their religious convictions and upbringing rather than subject themselves to the pain of not belonging.[32]

We submit that under the guaranty of separation and religious freedom, American children may not be placed in this dilemma by public school authorities. They may not be compelled to choose between being forced or influenced to profess a religious belief or disbelief or being punished for professing such belief or disbelief. It was to avoid in this country the oppression and bitterness which Old World experience had shown to be an inevitable concomitant of governmental intrusion in religion, that the fathers of our country gave constitutional protection to the principle that "religion is wholly exempt from [governments'] cognizance."[33] Religious compulsion and oppression, we submit, should not be allowed in the public schools even in a mild or subtle form.

Affirmance of the decision below would result in just such compulsion. The challenged statute requires school children to engage in an act of worship which conflicts with the conscience of some of them. The very bringing of this suit is proof of that fact. This court may not place the seal of approval on such oppression.

C. Aiding and preferring one religion

A statute providing for Bible reading and Lord's Prayer recitations in the public schools aids and prefers the Christian religion to the extent that the reading is from the New Testament and the recitation is of the Lord's Prayer, and aids and prefers the Protestant religion if the reading is

[32] Synagogue Council of America, *Conference on Religious Education and the Public School* (1944), p. 26; 2 Stokes, *Church and State in the United States* (1950), p. 548. In the *McCollum* case, the trial court found that Catholic and Jewish children, as well as Protestants, attended the classes in Protestant religious instruction in the public school. Transcript of Record in *McCollum* case, p. 65.

[33] Madison's Memorial and Remonstrance, first paragraph.

(as usually is the case) from the King James' version of the Bible, or the Catholic religion if the reading is from the Douay or Knox version.

The New Jersey courts have sought to meet the attack that the statute herein is preferential by adopting the argument employed by most of the state courts which have upheld such statutes, that the Bible and the Lord's Prayer are "non-sectarian" (R. 17-19, 31, 33, 35, 37-38). We shall indicate later that whatever relevance the claim of non-sectarianism may have had before the *Everson* and *McCollum* decisions, it is entirely irrelevant today. At this point, we urge only that the claim of non-sectarianism is purely fictional.[34]

1. We submit that characterizing the Lord's Prayer as non-sectarian constitutes a cavalier disregard of the convictions of adherents to the Jewish faith. We know of no Jewish religious authority who agrees with that characterization. The prayer itself is preceded by the injunction: "And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues [35] and in corners of the street, that they be seen of men" (St. Matthew 6:5). Even more important, designating as the "Lord" any human being violates a basic article of the Jewish faith.[36]

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[34] "There is no such thing as a universally accepted religion." *Knowlton* v. *Baumhover*, 182 Iowa 691, 704 (1918). See also: Moehlman, *School and Church, The American Way* (1949), Chapter entitled "Can the Bible Return to the Classroom?"

[35] The Jewish religion prescribes prayer in synagogue. *Shulchan Aruch, Orech Chaim*, Chap. 52.

[36] One of the thirteen basic articles of Jewish faith, codified by Maimonides, reads: "I believe that the Lord is not a body; and no corporeal relations apply to Him; and there exists nothing that has any similarity to Him." Mishneh Toreh, Yad Hachazokoh, Ch. 1. See also, Kohler, *Jewish Theology*, p. 29 (1918). The thirteen articles of faith are part of the daily prayer ritual of the Jews. *Jewish Encyclopedia* (1902), Vol. 2, pp. 150-151.

2. The New Jersey statute does not specify which version of the Bible or the Lord's Prayer is to be read, but obviously, some specific version of the Bible must be read. It is reasonable to assume (although it does not appear explicitly in the record, cf. R. 19) that the Protestant, or King James, version was used.[37] Characterizing the King James version of the Bible as "nonsectarian" is, we believe, an affront to adherents to the Catholic faith.[38] A Catholic child commits a grave sin if he knowingly owns or reads from the Protestant version of the Bible.[39] Catholic children who have received the Protestant Bible distributed by the Gideon Society in a number of schools, have been directed by their priests to return them,[40] and the distribution itself has been condemned by the Catholic Church.[41]

The fiction of the claimed "non-sectarianism" of the Bible has been recognized by the state courts which have considered the issue realistically.[42] The analysis by the

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[37] All the reported cases on Bible reading in which the version of the Bible used is disclosed involved the Protestant version. Keesecker, *Legal Status of Bible Reading*, U. S. Office of Educ., Bull. No. 14 (1930).

[38] The Translators' dedicatory preface states that the purpose of the translation was to give "such a blow unto that Man of Sin [the Pope] as will not be healed" and "to make God's holy truth to be yet more and more known to the people, whom they ('Papist persons at home or abroad') desire still to be kept in ignorance and darkness."

[39] Bouscaren and Ellis, *Canon Law, Text and Commentary* (1946), Canon 1399.

[40] Religious News Service, Dec. 6, 1950.

[41] Catholic Bulletin, May 28, 1940. Father L. J. Daby, local priest in a Massachusetts community where the Bible was distributed stated: "The issuing of the Gideon Bible, a sectarian Bible, in our public schools recently I take strong exception to. This is not Russia where children are being regimented, and we don't want such actions in this country." Religious News Service, May 17, 1950.

[42] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177 (1890); *State ex rel. Freeman* v. *Scheve*, 65 Nebr. 853 (1902); *Herold* v. *Parish Board*, 136 La. 1034 (1915); *Board of Education* v. *Minor*, 230 Oh. St. 211 (1872).

Supreme Court of Illinois in *People ex rel. Ring* v. *Board of Education* is, we submit, the only one consistent with the facts. The Court said:

> "It is further contended that the reading of the Bible in the schools constitutes sectarian instruction, and that thereby the provision of the Constitution is also violated which prohibits the payment from any public fund of anything in aid of any sectarian purpose. The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools.
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> "Christianity is a religion. The Catholic church and the various Protestant churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them it is a sectarian book containing errors and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version, as to them it is a sectarian book inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the schools to which they are required to send their children, than are Catholics to have the King James version read in schools which their children must attend.
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> "The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it. The Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence. Its words are entitled to be received as authoritative and final. The reading or hearing of such words cannot fail to impress deeply the pupils' minds. It is intended and ought to so im-

press them. They cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree. Granting that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrines of one or more of them. The petitioners are Catholics. They are compelled by law to contribute to the maintenance of this school, and are compelled to send their children to it, or, besides contributing to its maintenance, to pay the additional expense of sending their children to another school. What right have the teachers of the school to teach those children religious doctrine different from that which they are taught by their parents? Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their Church and use the Lord's Prayer as taught by another sect? If Catholic children may be compelled to read the King James version of the Bible in schools taught by Protestant teachers, the same law will authorize Catholic teachers to compel Protestant children to read the Catholic version. The same law which subjects Catholic children to Protestant influences will subject the children of Protestants to Catholic control where the Catholics predominate. In one part of the state the King James version of the Bible may be read in the public schools, in another the Douay Bible, while in school districts where the sects are somewhat evenly divided, a religious contest may be expected at each election of a school director to determine which sect shall prevail in the school. Our Constitution has wisely provided against any such contest by excluding sectarian instruction altogether from the school."

The entire non-sectarian claim is belied by the history of Bible reading legislation and litigation in this country.

These have been but an incident of the anti-Catholic nativism and know-nothingness which has disgraced American history in the nineteenth century.[43] The first statute requiring Bible reading in the public schools was enacted by the notorious Massachusetts Know-Nothing legislature of 1855, which, in addition, passed laws restricting office-holding to native-born citizens, requiring twenty-one years' residence for the voting privilege and appointing a "Nunnery Committee" to investigate convents, parochial schools and seminaries.[44] The first reported case to sustain the validity of Bible reading in the public school[45] involved a suit brought by a Catholic parent in Ellsworth, Maine, at the urging of the local priest. The infuriated Protestant community seized the priest, tarred and feathered him and rode him out of town.[46] Some ten years earlier, in 1844, Bishop Kenrick of Philadelphia protested because Catholic children were required to read the Protestant Bible in the public schools. The Philadelphia Protestant community became aroused over this "Papist attack" on their Bible. Riots broke out in which Catholic churches and schools were burned and at least ten persons lost their lives.[47]

These incidents are cited merely to show the unreality of the claim of non-sectarianism. We have outgrown the period of virulent anti-Catholic prejudice which gave rise to these incidents. But it must not be supposed that the introduction of religious instruction and practices in the public schools does not even today bring with it interre-

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[43] Beale, *History of Freedom of Teaching in American Schools* (1941), 102-103; Myers, *History of Bigotry in the United States* (1943) 176; Billington, *Protestant Crusade* (1938) 388.

[44] Billington, *supra*, p. 414.

[45] *Donahoe* v. *Richards*, 38 Me. 407 (1854).

[46] Williams, *The Shadow of the Pope* (1932), pp. 84-87.

[47] O'Gorman, *History of the Roman Catholic Church in the United States*, 356-360; Billington, *Protestant Crusade*, 220-230.

ligious tensions, ill-feeling and acrimony.[48] Of all places, the public schools should not be the arena for these conflicts. As Mr. Justice Frankfurter stated: "In no activity of the State is it more vital to keep out divisive forces than in its schools."[49]

D. Aid to all religions

The defense of "non-sectarianism", even if it were based on reality rather than fiction, has no relevancy to a determination of the validity of the New Jersey statutes under the First Amendment. The justification of "non-sectarianism" was adopted by State courts which were required to decide whether Bible reading or prayer recitation violated State constitutional prohibitions of "sectarian" teaching or practices in the public schools.[50] These cases were all decided before it was recognized that the Fourteenth Amendment subjected the States to the First Amendment's prohibition of laws respecting establishment of religion or prohibiting its free exercise.[51] Hence, the limitations upon governmental action in the field of religion imposed by the First Amendment were irrelevant and were not considered.

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[48] For an example of Catholic-Protestant tensions rising out of Protestant baccalaureate services in the public schools, see New York Times, June 15, 16, 18, 20, 21, 1950. For examples of Christian-Jewish tensions arising from Nativity programs in the public schools, see New York Herald Tribune, Dec. 6, 1947; Chelsea (Mass.) Record, Dec. 6, 8, 10, 1949.

[49] Concurring in *McCollum* case, 333 U. S. 203 at 231.

[50] *Hackett* v. *Brooksville Grade School*, 120 Ky. 608 (1905); *Billard* v. *Board of Education*, 69 Kans. 53 (1904); *Church* v. *Bullock*, 104 Tex. 1 (1908); *Wilkerson* v. *City of Rome*, 152 Ga. App. 762 (1921); *People* v. *Stanley*, 81 Colo. 276 (1927); *Kaplan* v. *Independent School District*, 171 Minn. 142 (1927).

[51] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Minersville School District* v. *Gobitis*, 310 U. S. 586, 593 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943); *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCollum* v. *Board of Education*, 330 U. S. 203 (1948).

Today, however, State statutes providing for Bible reading and prayer recitation in the public schools must be tested by the standard prescribed by the First Amendment as well as by State constitutions. Under the First Amendment, as defined in the *Everson* and *McCollum* cases, it is not conclusive that State action is "non-sectarian", i.e., non-preferential as among the religious sects. State action violates the ban of the First Amendment if it aids all religions on a non-preferential basis. It is unconstitutional if it is "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faiths",[52] even if all religious groups are so aided.

We submit, therefore, that even if devotional Bible reading or Lord's Prayer recitations were acceptable to the three major faiths (without according consideration to the religious convictions of other than Protestants, Catholics and Jews) and could be designated "non-sectarian", they would still fall under the ban of the First Amendment, unless this Court erred in its interpretation of the First Amendment in the *Everson* and *McCollum* cases.

E. The real issue

This, we submit, is the real issue in this case: Shall this Court retrace its steps and retreat from the position it stated in *Everson* and repeated in *McCollum*? When the fact pattern of the *McCollum* case was presented to this Court it was clear that the program for religious instruction therein involved would not stand unless the views expressed by both the majority and minority in the *Everson* case were repudiated. Accordingly, the appellees there argued that historically the First Amendment was intended to forbid only government preference of one religion over another, not impartial governmental assistance to all religions. This Court gave "full consideration" to the argu-

[52] *McCollum* case, 333 U. S. at 210.

ments presented but found no reason to change its conclusions.[53]

Twice rejected by this Court, this narrow interpretation of the First Amendment has, however, found ready acceptance and passionate defense particularly in sectarian circles.[54]

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[53] 333 U. S. 203 at 211.

[54] See, e.g., Statement of Catholic Bishops, *supra*:

"To one who knows something of history and law, the meaning of the First Amendment is clear enough from its own words: 'Congress shall make no laws [sic] respecting an establishment of religion or forbidding [sic] the free exercise thereof.' The meaning is even clearer in the records of the Congress that enacted it. Then and throughout English and Colonial history 'an establishment of religion' meant the setting up by law of an official Church which would receive from the government favors not equally accorded to others, in the cooperation between government and religion—which was simply taken for granted in our country at that time and has, in many ways, continued to this day. Under the First Amendment, the Federal Government could not extend this type of preferential treatment to one religion as against another, nor could it compel or forbid any state to do so.

"If this practical policy be described by the loose metaphor 'a wall of separation between Church and State', that term must be understood in a definite and typically American sense. It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term 'separation of Church and State' as it has become the shibboleth of doctrinair secularism. * * *

"We, therefore, hope and pray that the novel interpretation of the First Amendment recently adopted by the Supreme Court will in due process be revised. To that end we shall peacefully, patiently and perserveringly work. * * *

"We call upon our Catholic people to seek in their faith an inspiration and a guide in making an informed contribution to good citizenship. We urge members of the legal profession in particular to develop and apply their special competence in this field. We stand ready to cooperate in fairness and charity with all who believe in God and are devoted to freedom under God to avert the impending danger of a judicial 'establishment of secularism' that would ban God from public life."

See also: O'Neill, *Religion and Education Under the Constitution* (1949); Parsons, *The First Freedom* (1948); Murray, *Law or*

It is unfortunate that considerable bitterness and lack of good taste has characterized much of the discussion.[55] But the issue once more is before the Court and once more the Court is called upon to reaffirm the principles announced unanimously and definitively in the *Everson* case.

The principle of the separation of religion from government and the obligation of neutrality between religious and non-religious groups imposed by that principle are not the recent invention of this Court.[56] They are based

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Prepossession? 14 Law and Contemp. Problems, 23 (1949); Van Dusen, *God in Education* (1951); Pike, *Secularization and the Church*, Bulletin of General Theological Seminary, June 1951, 21.

[55] See, e.g., O'Neill, *Religion and Education Under the Constitution*, *passim*.

[56] Besides the references in Mr. Justice Frankfurter's concurring opinion in the *McCollum* case, 333 U. S. 203, 218-219, see, e.g. Madison: "* * * strongly guarded * * * is the separation between Religion and Government in the Constitution of the United States." Fleet, *Madison's "Detached Memoranda"*, 3 William & Mary Quarterly 534, 555 (3rd Ser. 1946); Philip Schaff: "* * * the state must be equally just to all forms of belief and unbelief which do not endanger the public safety", Church and State in the United States, 10 (1888); Francis Lieber: "It belongs to American liberty to separate entirely that institution which has for its object the support the diffusion of religion from the political government. * * * No worship shall be interfered with, either directly by persecution, or indirectly by disqualifying members of certain sects, or by favoring one sect above others; and no church shall be declared the church of the state or the established church; *nor shall the people be taxed by the government to support the clergy of all churches*, as in the case in France"; *Civil Liberty and Self-Government* (1852); James Bryce: "It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seem to be no two opinions on this subject in the United States"; *The American Commonwealth*, Vol. 2, p. 766 (3rd ed. 1894); David Dudley Field: "* * * the greatest achievement ever made in the cause of human progress is the total and final separation of church and state. If we had nothing else to boast of, we would lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private con-

on the concept expressed by Madison in the statement that religion is "not within the cognizance of civil government," [57] and of the Presbytery of Hanover against the same Assessment Bill which was the subject of Madison's Remonstrance:

> "The end of Civil government is security to the temporal liberty and property of Mankind; and to protect them in the free exercise of Religion. Legislators are invested with power from their Constituents for these purposes only; and their duty extends no farther. Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be resigned to the will of the society at large; and much less to the Legislature, which derives its authority wholly from the consent of the People; and is limited by the Original intention of Civil Associations * * *." [58]

That this principle is based on friendliness to religion rather than on enmity, is evident from its so warm an espousal by religious bodies.[59] It is even more evident from the position of strength and influence which religion has achieved in the United States under the protection of the guaranty of religious liberty and separation of church and state.

By and large, the American people have been faithful to the unique and radical experiment formalized in the "establishment" and religious liberty provision of the First

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cern, into which other men have no right to intrude. To measure the stride thus made for the Emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world." Quoted in *Stokes*, Vol. 1, p. 37.

[57] Memorial and Remonstrance, paragraph 8.

[58] *American State Papers on Freedom in Religion* (1949), p. 110. See also *Petition of Sundry of the Inhabitants of Rockingham County against the Assessment Bill* (quoted in Stokes, *Church and State in the United States*, Vol. 1, p. 363): "* * * the power of Civil Government relates only to Men's Civil Interests. * * *"

[59] *Ibid.* See also, Petition of the General Committee of the Baptists against the Assessment Bill, quoted in Stokes, Vol. 1, p. 373.

Amendment.[60] So conclusive was Madison's victory in the Virginia legislature that in the more than a century and a half since the Amendment was adopted, Congress has never enacted—nor indeed been called upon to consider—a bill for the support of teachers of religion.[61] Under this system of mutual independence of church and government religion has flourished in this country to an extent unparalelled elsewhere.[62] In 1790 not more than one out of eight

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[60] *Everson*, 330 U. S. 1 at 14. See, also, Schaff, *Church and State in the United States* (1888), p. 15:

> "To be just, the state must either support all or none of the religions of its citizens. Our government supports none, but protects all."

[61] The latest Congressional expression on the question was its enactment in July, 1950, of the Organic Act of Guam (Public Law 630 of the 81st Congress), Section 5, subdivision (p) of which provides: "No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit or support of any priest, preacher, minister or other religious teacher or dignitary as such." In December, 1950, resolutions for public aid to religious education and inclusion of religious teaching in the public schools were defeated at the White House Mid-Century Conference on Children and Youth. This conference, representing every area of American life, instead affirmed the principle of separation and the preservation of the American secular public school system. *New York Times*, December 1, 6, 8, 1951.

[62] By 1830, DeTocqueville could note that "there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America." *Democracy in America* (1 Amer. ed. 1851), Vol. I, p. 332. A half century later, Bryce remarked that while the "legal position of a Christian church is in the United States simply that of a voluntary association or group of associations corporate or unincorporate, under the ordinary law", yet "the influence of Christianity seems to be * * * greater and more widespread in the United States than in any part of western Continental Europe, and I think greater than in England." *American Commonwealth* (1st Ed.) 561. See, also, Schaff, *Church and State in the United States* (1888), p. 55:

> "* * * the American nation is as religious and as Christian as any nation on earth, and in some respects even more so, for the very reason that the profession and support of religion are left entirely free."

Americans[63] and possibly as few as one out of twenty-five[64] belonged to any church. Today, at least one out of every two Americans is a church member.[65] Mr. Justice Rutledge was clearly right when he stated that complete separation between religion and the state is best, not only for the state, but for religion as well.[66]

Acceptance of the contention that the First Amendment permits governmental aid to religion on a non-preferential basis would require a determination that an affirmative grant of legislative power, theretofore lacking, was made in language prohibiting legislative action. For, absent the First Amendment, it is clear that Congress has no power to aid religion, preferentially or non-preferentially. As Madison put it, "there is no shadow of right in the general government to intermeddle with religion."[67] "The Government," said Madison, "has no jurisdiction over it."[68] Indeed, there was a strong feeling that the First Amendment was "altogether unnecessary inasmuch as Congress has no authority whatever delegated to them by the Constitution to make religious establishments.[69] Dissatisfied with the absence of conferred power, the states demanded

[63] Stokes, *Church and State in the United States*, Vol. 1, 229-230.

[64] Garrison, *History of Anti-Catholicism in America*, Social Action, p. 9 (Jan. 15, 1948).

[65] U. S. Department of Commerce, *Census of Religious Bodies*, 18 (1936); *Yearbook of American Churches* (1951 edition), p. 239.

[66] Dissenting in *Everson* case, 330 U. S. 1 at 59.

[67] Writings of Madison, Vol. 5, p. 176 (Hunt ed. 1920).

[68] *Ibid.*, p. 132.

[69] 1 Annals of Congress, 729 (1789).

"But it [the Constitution] is neither hostile nor friendly to any religion; it is simply silent on the subject, as lying beyond the jurisdiction of the general government." Schaff, *Church and State in the United States* (1888), pp. 39-40.

an express prohibition which it was the intent of the framers of the First Amendment to supply.[70] The result of adoption of the premise underlying the decision of the New Jersey Supreme Court in the present case would be to turn a prohibition against laws respecting an establishment of religion into a grant of power so passionately sought to be withheld from the Federal Government.[71]

If this Court were to adopt the limited interpretation of the First Amendment urged by the proponents of Bible reading and similar "non-preferential" aid to religion, it would be enacting into the Constitution what the Congress which framed the amendment specifically refused to enact, although it had two opportunities to do so. Twice when the First Amendment was debated in the Senate it was proposed to substitute either of the following for the House versions:

> "Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

And:

> "Congress shall make no law establishing any particular denomination or religion in preferenee to another,

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[70] Beard, *The Republic*, 166, 170 (1944): "The Constitution does not confer upon the Federal Government any power whatever to deal with religion in any form or manner. * * * The First Amendment merely confirms the intention of the framers." See also Bancroft's letter to Schaff: "* * * Congress therefore from the beginning was as much without the power to make a law respecting the establishment of religion as it is now after the amendment has passed." Schaff, *Church and State in the United States*, at p. 137.

[71] See Hamilton's prophetic warning in *The Federalist No. 84*: "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?" *Federalist Papers* 559 (Mod. Lib. ed. 1937).

or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

These versions expressly and unambiguously spell out the narrow, limited interpretation of the First Amendment. Yet both proposals were rejected.[72] We submit that this

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[72] Journal of Proceedings of the First Session of the United States Senate, pp. 63, 70 (for August 25 and, September 3, 1791). The text of the Journal entry is as follows:

"The resolve of the House of Representatives * * * was read, as followeth:

* * * * * * * .

"Art. III. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."

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The Senate resumed the consideration of the resolve of the House of Representatives on the amendments to the Constitution of the United States.

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On motion to amend Article the third, and to strike out these words: 'Religion, or prohibiting the free exercise thereof"; and insert 'No religious sect or society in preference to others:'

It passed in the negative.

On motion for reconsideration:

It passed in the affirmative.

On motion that Article the third be stricken out:

It passed in the negative.

On motion to adopt the following, in lieu of the third Article: 'Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society:'

It passed in the negative.

On motion to amend the third Article, to read thus: 'Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:'

It passed in the negative.

On the question upon the third Article as it came from the House of Representatives:

It passed in the negative.

On motion to adopt the third Article proposed in the resolve of the House of Representatives, amended by striking out these words, 'Nor shall the rights of conscience be infringed:'

It passed in the affirmative."

Court may not write into the Constitution what both the Constitutional convention and the Congress which framed the First Amendment specifically rejected.

CONCLUSION

The reading of a few verses daily from the Bible or the recitation of the Lord's Prayer in the public schools might not seem to present a major threat to the constitutional guaranty of separation and religious liberty. Some courts have characterized the encroachment as trivial.[73] The practice is not deemed trivial to those whose religious convictions have caused them to suffer persecution rather than submit. But even if the encroachment were in itself minor, its danger to the American secular public school system and the constitutional principle of separation and religious liberty would not be less. We are dealing with an area in which every sanctioned minor encroachment permits a precedent justifying further encroachment.[74] The statute is "a first step in the direction of an 'establishment of religion'; and * * * the first step in that direction is the fatal step, because it logically involves the last step."[75]

Washington issued a proclamation recommending a day of thanksgiving in language embracing all who believed in a Supreme Ruler of the universe, but to Adams this was a precedent justifying a proclamation calling for Christian worship,[76] and Mr. Justice Brewer of this Court found these declarations to be precedents for the proposition that

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[73] See, e.g., *Wilkerson* v. *City of Rome*, 152 Ga. 763. The New Jersey Supreme Court in the present case emphasized that the religious exercise provided by the statute was "short" (R. 37, 39).

[74] See Dissenting Opinion of Mr. Justice Rutledge in *Everson* case, 330 U. S. 1 at 57-58.

[75] *Board of Education* v. *Minor*, 23 Oh. St. 211, 250 (1872).

[76] Fleet, *Madison's "Detached Memoranda"*, 3 William & Mary Quarterly, 534, 561 (3rd ser., 1946).

"we are a Christian nation".[77] In 1864 "In God We Trust" was placed upon our coins. It has now been cited by the New Jersey Supreme Court as authority for public school Bible reading and Lord's Prayer recitation,[78] and by the New York Court of Appeals to justify released time from public school for religious education.[79]

An affirmance here, however, would set a precedent of an entirely new kind. It would give the highest judicial sanction to a breach in the wall of separation. Thanksgiving proclamations, rubrics on coins and the like have not received such sanction. They are not susceptible to judicial consideration. They have occurred and continued, not because they are constitutional but because their constitutionality cannot be attacked in the courts. If this Court now approves devotional exercises in public schools, it will supply that judicial sanction which is all that is needed for much greater violations of the separation principle. The basic theory of the decision below is unrelated to the gravity or triviality of Bible reading. If it is upheld, much more than Bible reading will have been permitted.

It is with remarkable prescience that Madison warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[80] Today, as in Madison's day "we must say that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all

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[77] *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 468 (1892). Jefferson characterized the contention that Christianity is part of the common law as a "judicial forgery" growing out of a "conspiracy * * * between Church and State". *Writings of Jefferson* (ed. 1903), Vol. 16, p. 51.

[78] R. 27.

[79] Concurring opinion of Judge Desmond in *Zorach and Gluck* v. *Clauson*, 303 N. Y. 161 at 181 (1951).

[80] Memorial and Remonstrance, par. 3.

our fundamental rights; or that they are bound to leave this particular right untouched and sacred." [81]

We submit that it was the purpose of our Constitution and the First Amendment to leave the right to religious liberty and a state separated from the church "untouched and sacred". Adherence to that peculiarly American principle in the United States has resulted in the elevation of religion to a status of strength and influence unparalleled in the world, and in the evolution of a system of public education for all children free of sectarian strife and controversy. Preservation of that enviable position of religion and school requires continued faithful adherence to the American principle. Faithful adherence to that principle requires reversal of the judgment herein.

Respectfully submitted,

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New York, November, 1951.

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[81] *Ibid.*, par. 15.